71-5025

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. A-112

JOHN EMANUEL PANZAVECCHIA,

Petitioner

vs.

UNITED STATES of AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JOHN EMANUEL PANZAVECCHIA, your Petitioner, respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgments of said Court entered in Case Number 30044 on the 28th day of May, 1971 and the 2nd day of July, 1971 (denying Rehearing).

OPINIONS BELOW

FIFTH CIRCUIT. The opinion of the Court below in this case (Appendix A, infra) and the decision on Petition for Rehearing (Appendix B, infra).

The opinion of the Court below in Case Number 27322 (Appendix C infra).

DISTRICT COURT. The order of the District Court from which the Appeal in this cause was taken and the order of the District Court from which appeal was taken in Case Number 27322 (Judgment of conviction and sentence as to Count one and Two and Judgment of Acquittal as to Count Three Appendix D infra).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra) was entered on the 28th day of May, 1971 and a timely Petition for Rehearing was denied on the 2nd day of July 1971. The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1254 and Rule 37(b) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

The Petitioner was indicted under Case Number 68-92 (Appendix E, infra) and found guilty as to Counts One and Two and acquitted as to Count Three (Appendix D, infra) in

the District Court. On appeal in Case Number 27322 (Appendix C, infra) the United States Court of Appeals Fifth Circuit reversed the decision of the District Court. Subsequently the Petitioner was reindicted under Case Number 70-23 (Appendix F, infra) and was found guilty as to Count Two and acquitted as to Count One. The indictments in each case were iddentical with the exception that in the latter case the name of a store was inserted, the owners of which testified almost identically in both cases.

Further, the Appellate Court in this cause, in affirming the Lower Court considered evidence of a crime for which the Petitioner was found not guilty. The questions thus presented are:

1...Whether the Petitioner was charged with an offense and found guilty of same for which he has previously been placed in jeopardy.

2...Whether the Appellate Court in affirming the decision of the Lower Court can consider evidence of a crime for which the Petitioner had been found not guilty.

STATUTORY PROVISIONS INVOLVED

The applicable statutary provisions involved are the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

This cause arose initially from the filing of an indictment under Case Number 68-92 in the United States District Court for the Southern District of Florida charging Three Counts, each for passing and uttering certain counterfeit obligations of the United States in violation of Title 18 U. S. C., Sec. 472 (Appendix E, **infra**). In that indictment it is to be observed that all Three Counts were absolutely identical in wording, down to the last punctuation mark, and completely indistinguishable. Subsequently that cause was tried by jury which returned its verdict finding the Petitioner guilty as to Counts Three (Appendix D, **infra**), The Petitioner appealed the findings of guilty as to Counts one and two in Case Number 27322 in the United States Court of Appeals for the Fifth Circuit and that Court reversed the judgments of guilty (Appendix C, **infra**).

Subsequently thereto a new indictment was filed charging the Petitioner with two Counts of passing and uttering certain counterfeit obligations of the United States in violation of Title 18 U. S. C. Sec. 472 under Case Number 70-23 (Appendix F, **infra**). This cause was tried by a jury and the jury returned its verdict finding the Petitioner not guilty as to Count one and guilty as to Count two. The petitioner appealed the finding of guilty as to Count two in Case Number 30044 in the United States Court of Appeals for the Fifth Circuit and that Court affirmed the judgment of guilty (Appendix A, **infra**).

The same witnesses testified in both cases and the evidence was substantially the same. In this latter case a MR. IRIS testified that he received a $10.00 bill from the Petitioner and took the said bill to the bank and gave it to a MR. BILLOW. MR. BILLOW did not testify. However there

was testimony from a MR. HARLAN an officer from the bank, that he received a $10.00 bill from a MR. BILLOW. That he, MR. HARLAN did not see MR. IRIS give the said note to anyone nor did he see MR. IRIS in the bank and could not truthfully say of his own knowledge that the said $10.00 bill was presented to the bank from IRIS DRUGS. The said $10.00 was permitted over objection to be introduced into evidence. It is this notion upon which the the Petitioner was found guilty.

REASONS FOR GRANTING THE WRIT

The issues presented in this Petition concern the United States Constitutional rights and guarantees of the Petitioner. The decision of the United States Court of Appeals for the Fifth Circuit violates these rights as guaranteed in the Fifth and Fourteenth Amendments to the United States Constitution relating to Double Jeopardy and due process of law and is in conflict with decisions of this Court and other United States Court of Appeals.

The Petitioner was originally tried upon an information composed of Three Counts, each Count being identical to the other. At that trial the Petitioner was found Not Guilty as to Count Three.

An appeal as to the finding of guilt on the remaining two counts resulted in a reversal of the judgment of guilty. By way of a new indictment the Petitioner was retried on two Counts and found not guilty on Count one and guilty on Count two. An examination of Count three of the old indictment and an examination of Count two of the new indictment will show that both are identical in each and

every respect with the exception that in the second indictment the allegation "at IRIS DRUGS" was added. The witnesses in the second trial were the same as those in the first trial. MR. IRIS testimony was essentially the same both times.

The Federal Courts recognize that the guarantee against double jeopardy is grounded in the concept of due process of law and is fundamental to the American Scheme of Justice. Will v. United States, 389 U.S. 90, 88 S. Ct. 269 (1967): Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056 (1969).

A Seventh Circuit Court of Appeals has clearly defined 'double jeopardy' as follows: "Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the same only when the evidence required to support the conviction upon one of them (the indictments) would have been sufficient to warrant a conviction upon the other." United States v. Bruni, 359 F. 2d 807 (1966).

This Court has considered the Constitutional guarantee against Double Jeopardy, as provided by the Fifth Amendment of the Constitution of the United States and, in Gavieres v. United States, 220 U.S. 338, 31 S. Ct. 421, 422 (1910) set forth the test for double jeopardy in the following language: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other...A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

In the case-at-bar, there is no issue as to there being two separate violations of law as the Petitioner was charged with violating the same law in each instance. Furthermore, the exhibits and testimony, as well as the fact that the same witnesses testified, show that the same facts could convict under the count which Petitioner has been acquitted in the old Indictment as under the count upon which he now stands convicted. Clearly, a more patent example of double jeopardy would be difficult to find. It tramples upon the Petitioner's constitutional right to not be twice placed in jeopardy for the same offense.

The position taken by the United States Court of Appeals for the Fifth Circuit manifests a flagrant repudication of the hearsay rule.

The rule excluding hearsay evidence is based on the lack of opportunity to test by cross-examination the veracity and accuracy of the statement offered. This rule is basic, rather than technical. The reason for the rule is that the unsworn statement of a person not called as a witness or subjected to the test of cross-examination is not recognized as having sufficient probative effect to raise an inference that the fact is as stated. Superior Engraving Co. v. N.L.R.B., CA; 183 F. 2d 783.

Count Two of the Indictment of which the Petitioner stands convicted alleges that he passed and uttered a certain counterfeit note. MR. IRIS, the man to whom the note was allegedly passed never identified the said note and there is no testimony that the note introduced into evidence is the note given to MR. IRIS.

The United States Court of Appeals for the Fifth Circuit, in its opinion sought to be reviewed states as follows: "Counsel for the defendant contend that HARLAN did not

personally see IRIS give the Ten Dollor Note to BILLOW, and that HARLAN's testimony that BILLOW told him that IRIS brought such note to BILLOW was hearsay. Of course, it was hearsay." Yet in spite of this they discuss testimony pertaining to Count One, the Count wherein the Petitioner was fodnd not guilty and then further state in their opinion,"In view of those facts and the fact that BILLOW received only the one note and other surrounding facts and circumstances, it is a reasonable inference that the single note BILLOW initialed and turned over to HARLAN was the note he received from IRIS.

The violation of the hearsay rule and the permitting of a conviction to stand on hearsay evidence is a violation of the due process clause of the United States Constitution.

CONCLUSION

The decision below is palpably erroneous. It violates the constitutional guarantees of the Petitioner and ignores the basic issues basing its decision upon unwarranted generalities. For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION AND JUDGMENT BELOW IN CASE No. 30044

(TITLE OMITTED)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN EMANUEL PANZAVECCHIA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(May 28, 1971)

Before BROWN, Chief Judge, and PHILLIPS,* and INGRAHAM, Circuit Judges.

PHILLIPS, Circuit Judge: Panzavecchia, hereinafter referred to as the defendant, was charged by a two-count indictment with violations of 18 U.S.C. § 472.

The first count charged that "on or about January 12, 1968, at Shatkin Drugs, in Hollywood, Broward

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*Of the Tenth Circuit, sitting by designation.

County, in the Southern District of Florida John Emanuel Panzavecchia with intent to defraud, did pass and utter a certain counterfeit obligation of the United States, to wit: One counterfeit $10.00 Federal Reserve Note (Series 1950 E) drawn on the Federal Reserve Bank of San Francisco, California, bearing Serial No. L 42853082 D, and which the defendant then knew to be counterfeit, in violation of Title 18, United States Code, Section 472."

The language of Count One and the language of Count Two is identical, except the former alleges that the offense therein charged was committed "at Shatkin Drugs" and the latter alleges that the offense therein charged was committed "at Iris Drugs."

Thus, it will be seen that the alleged different offenses involved two different Federal Reserve Notes, although the serial number of both was the same and they were both of the same series and issued by the same Federal Reserve Bank.

The defendant was tried and found not guilty on Count One and found guilty on Count Two. The court entered a judgment of acquittal on Count One and a judgment of conviction on Count Two and imposed sentence.

Prior to the return of the indictment in this case, the defendant had been charged in a three-count indictment with violations of 18 U.S.C. § 472. Count One of such indictment charged that "on or about January 12, 1968, at Hollywood, in Broward County, in the

Southern District of Florida, the defendant, John Emanuel Panzavecchia with intent to defraud, did pass and utter a certain counterfeit obligation of the United States, to wit: One counterfeit $10.00 Federal Reserve Note (Series 1950 E) drawn on the Federal Reserve Bank of San Francisco, California, bearing Serial No. L 42853082-D, and which the defendant then knew to be counterfeit, in violation of Title 18, United States Code, Section 472."

The language in Counts Two and Three of such indictment was identical with the language of Count One.

The Government, in response to a motion of the defendant, filed a bill of particulars in an effort to distinguish the offenses sought to be charged in the three-count indictment by stating that the offense charged in Count One was committed at "Shatkin Drugs," the offense charged in Count Two was committed at "Iris Drugs," and the offense charged in Count Three was committed at "Burger King Restaurant."

It will be noted that the second indictment does not charge an offense committed at the Burger King Restaurant.

On appeal from the judgments of conviction on Counts One and Two of the three-count indictment, the court reversed such judgments. In its opinion, the court in part said:

> "* * * Here three counts of an indictment contain verbatim language and their fusion in-

> to one and the same thing renders them inseverable as identifiable entries of separate and distinct criminal charges."

The court further said that because of the identity of the language in such three counts the charges therein were not sufficiently accurate to enable the defendant to plead former acquittal or conviction, should he subsequently be charged with similar offenses (citing *Van Liew v. United States,* 5 Cir., 321 F.2d 664).

The court also held that the bill of particulars was insufficient to cure the defects in each of the three counts, but stated at the close of its opinion:

> "* * * Nothing which we have said in this opinion will, however, preclude the issuance of a new indictment in proper form. 18 U.S.C. Sec. 3289."

Additional facts will be stated as we discuss the grounds urged by the defendant for reversal of the judgment of conviction on Count Two of the second indictment.

Count Two of the second indictment was not defective because it did not allege the name of the person to whom the Federal Reserve Note was passed.

18 U.S.C. § 472 does not require that there be an indictment to defraud one of a particular class of persons or that the forged obligation be passed to one

of a class of particular persons. The statute, in part here pertinent, reads:

> "Whoever, with intent to defraud, passes, utters, * * * any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Accordingly, we hold that the name of the person to whom the forged obligation is uttered or passed is not an essential element of the offense, and need not be alleged or set out in the indictment.[1] However, it would be better to do so, because ordinarily the defendant would be entitled to the name or other identification of such person by a bill of particulars.

Defendant contends that he can assert the defense of double jeopardy to Counts One and Two of the second indictment, because he was acquitted by the jury on Count Three of the first indictment, notwithstanding that he was convicted on Counts One and Two of the first indictment.

Although the first indictment was fatally defective, the bill of particulars showed that three separate and distinct offenses were involved, and the record in the first case shows that the Government, at the trial on the first indictment, undertook to prove three separate

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[1]Barbee v. United States, 5 Cir., 392 F.2d 532, 539; Buono v. United States, D.C.S.D. N.Y., 126 F.Supp. 644, 645; United States v. Ferra, 5 Cir., 427 F.2d 1348, 1350.

and distinct offenses, and that the offense charged in Count Three of the First indictment was committed at the Burger King Restaurant and the offenses charged in Counts One and Two thereof were committed at other places, to wit, in Count One at Shatkin Drugs and in Count Two at Iris Drugs.

It must also be kept in mind that the trial court held the first indictment was good and permitted proof of three separate and distinct offenses and instructed the jury to return three separate verdicts, and that three separate verdicts were returned by the jury.

Even if the verdict on Count Three of the first indictment was inconsistent with the verdicts on Counts One and Two thereof, when viewed in the light of the holding of this court on the first appeal, such inconsistency would not have impaired the verdicts of conviction on Counts One and Two or the verdict of not guilty on Count Three.

Rational consistency between the verdicts of a jury is not required.[2]

Consistency in a jury's verdicts on separate counts of an indictment is not required.[3]

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[2]United States v. Costello, 2 Cir., 221 F.2d 668, 676; affirmed 350 U.S. 359;
Speers v. United States, 10 Cir., 387 F.2d 698, 703, cert. denied 391 U.S. 934;
United States v. Andreadis, 2 Cir., 366 F.2d 423, 434, cert. denied 385 U.S. 1001;
Maxfield v. United States, 10 Cir., 360 F.2d 97, 99.

[3]Ehrlich v. United States, 5 Cir., 238 F.2d 481, 485;
United States v. Russo, 7 Cir., 335 F.2d 299, 301;
Speers v. United States, 10 Cir., 387 F.2d 698, 703, cert. denied, 391 U.S. 934;
United States v. McGee, 6 Cir., 315 F.2d 479, 481;
Dunn v. United States, 284 U.S. 390, 393.

A conviction may not be set aside even though the jury's verdict finding the defendant guilty on one count of an indictment is inconsistent with its verdict finding him not guilty on another count.[4]

It is well settled law that when a defendant appeals his conviction of a criminal offense and secures a reversal thereof, a retrial of a defendant for the same offense does not subject him to double jeopardy.[5]

The rule applies in a case where as here an appellate court found the original indictment or information defective and the defendant was tried on a new indictment.[6]

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[4]Rua v. United States, 5 Cir., 321 F.2d 141, 143
Mogoll v. United States, 5 Cir., 138 F.2d 792, 793
Lambert v. United States, 5 Cir., 111 F.2d 961, 967

[5]United States v. Ewell, 383 U.S. 116, 124-125
Green v. United States, 355 U.S. 184, 189
Trono v. United States, 199 U.S. 521, 533
Stroud v. United States, 251 U.S. 15, 18
See also, United States v. Tateo, 377 U.S. 463, 466, where the reversal was in a collateral proceeding. The reason for the rule is stated in United States v. Tateo, supra, at page 466, as follows:

"* * * Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. * * *"

[6]United States v. Ball, 163 U.S. 662, 671-672
United States v. Tateo, 377 U.S. 463, 465
United States v. Ewell, 383 U.S. 116, 121
Eubanks v. Louisiana, 356 U.S. 584, 588
United States v. Berry, 7 Cir., 309 F.2d 311, 313
Stroud v. United States, 10 Cir., 283 F.2d 137, 141

We hold that the trial of the defendant on Counts One and Two of the second indictment did not subject him to double jeopardy.

On the second trial, the court did not err in refusing to admit evidence that the owner of Iris Drugs had failed to comply with the Florida statute designed to inform the public of the name of the owner of a business operated under a fictitious name. Failure of the owner of Iris Drugs to comply with such statute in nowise affected the criminality of uttering and passing to Iris Drugs a counterfeit Federal Reserve Bank Note, and was wholly irrelevant to any issue in the case.

The evidence showed that on January 12, 1968, Harry R. Iris was the manager of Iris Drugs; that on such date the defendant came to the drug store; that at that time Iris was waiting on trade at the front cash register and the tobacco and checkout counter; that the defendant came to such counter and asked for a pack of cigarettes and handed Iris a ten dollar bill; that he suspected the bill from the way it felt and looked, but that he finally accepted it and gave the defendant the change and a package of cigarettes; that he waited on a few more customers and then rushed over to the First National Bank of Hollywood, located diagonally across the street intersection from the drug store; that he gave the note to Milton Billow, at the latter's cage; that Billow kept the note; that the defendant resembled the man who gave him the bill on January 12, 1968, but that two years had elapsed (actually two years, three months, eighteen days), and that he could not positively identify him as the man

who purchased the package of cigarettes and gave him the ten dollar bill. He further testified, however, that he was able to identify and did identify the person who was the defendant at the first trial as the man who purchased the cigarettes and gave him the ten dollar bill on January 12, 1968, and that he still had a vivid recollection of how the defendant at the first trial looked, as he observed him in the courtroom from the witness stand; and that the defendant at the first trial was the same man who was the defendant then on trial.

We hold that there was no error in admitting the testimony of Iris that he was able to identify the defendant at the first trial as the man who purchased the cigarettes and gave him the ten dollar bill. Iris had been subject to cross-examination at the first trial, and his statements were necessary as background for his testimony and explanation that he still had a vivid recollection of the appearance of the man who was the defendant at the first trial.[7]

The testimony of Iris, and other corroborating facts and circumstances, adequately identified the defendant as the man who uttered and passed the Federal Reserve Note to Iris.

Samuel B. Harlan testified that on January 12, 1968, he was an assistant vice president of the First National Bank of Hollywood; that on that date Milton Billow,

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[7]See United States v. Schwartz, 3 Cir., 390 F.2d 1, 6; United States v. DeSisto, 2 Cir., 329 F.2d 929, 933.

who was then the head teller at the bank, called him to his cage and showed him a Federal Reserve Note that Billow said Iris had brought to him; that Billow put his initials on the note in his presence; that he was familiar with Billow's signature, and he identified Government Exhibit 2, on which the second count of the indictment was based, as the Federal Reserve Note on which Billow placed his initials on January 12, 1968; and that after Billow placed his initials on such Federal Reserve Note it was then sent by the Bank, in accordance with regular United States Treasury Department procedures, to the United States Secret Service, accompanied with a completed report on a form prescribed by the United States Treasury Department.

Counsel for the defendant contend that Harlan did not personally see Iris give the ten dollar note to Billow, and that Harlan's testimony that Billow told him that Iris brought such note to Billow was hearsay. Of course, it was hearsay.

Sheila Shatkin testified that her husband, Harry Shatkin, owned the Shatkin Drug Store, operated under the name, "Shatkin Drugs"; that they opened the store about 9 a.m. on January 12, 1968; that her husband then went out to get them some coffee; that shortly after they opened the store and before her husband returned with the coffee, the defendant came in and purchased a bottle of aspirin and paid for it with a ten dollar bill and she gave him the change; that shortly after the defendant had left the store another customer came in; that her husband had returned; that he sold the other customer a two dollar item and the

customer paid her for it with another ten dollar bill; that there were no other ten dollar bills in the cash register, except the two she had received that morning from the defendant and the second customer; that she told her husband the first two sales that morning had been paid for with ten dollar bills and he ought to go to the bank, which was a short distance away from the drug store, and have the ten dollar bills changed to ones or fives because she might not have enough small bills for change during the balance of the day. She further testified that she was looking out of the window and saw her husband cross the street and go into the bank.

Harlan testified further that he was called to the walk-up window by the drive-in teller on January 12, 1968; that Harry Shatkin was there; that the teller had two ten dollar bills which he gave to Harlan; that he gave Shatkin a receipt therefor; that he took the bills to the head teller, Billow, and had him initial them; that then, in accordance with standard Treasury Department procedure, the bills were sent to the United States Secret Service, accompanied by a completed report with respect to such bills on a Treasury Department form.

Iris testified that it was about 10 a.m. when he sold the defendant the package of cigarettes; that he suspected the bill was counterfeit; that after he had waited on a few more customers, he rushed over to the bank and took the bill he had received from the defendant for the cigarettes to Billow at his head teller's cage, asked him if it was good, and turned it over to Billow.

While it is obvious that Billow, the drive-in teller at the walk-up window, and Harlan thought all three bills were counterfeit, else they would not have followed the procedure prescribed by the United States Treasury Department for banks to follow when they suspected they had received counterfeit United States obligations, the trial court refused to allow them to so testify when objection thereto was raised by counsel for the defendant.

It is also obvious that the incident when Billow called Harlan to his cage and initialed one ten dollar Federal Reserve Bank Note and gave it to Harlan occurred at one time, and the incident when Harlan took the two Federal Reserve Bank Notes which he had received from Shatkin to Billow and had Billow initial them occurred at a different time, probably prior to the time Billow called Harlan to the cage and initialed one note and gave it to Harlan.

In view of those facts and the fact that Billow received only the one note, and other surrounding facts and circumstances, it is a reasonable inference that the single note Billow initialed and turned over to Harlan was the note he received from Iris.

Hence, we hold that the Government's Exhibit 2 was properly identified as the note charged in the second count of the second indictment and was properly received in evidence.

The testimony of Joseph M. Capasso, called as a witness for the Government, established these facts:

On January 29, 1970, Capasso was a Special Agent for the United States Secret Service, assigned to New York City. On that date, he went to the defendant's home in Astoria, New York, for the purpose of arresting him for the offenses charged in the second indictment. Capasso told the defendant his name, that he was an Agent of the United States Secret Service, and furnished him with identification. Capasso told the defendant that he was under arrest and informed him of the charges against him, and advised the defendant that "before we asked him any questions, that he would have the right to remain silent and that anything that he said could be used against him, and that he had the right to an attorney and that he could stop the questioning at any time and have an attorney present," and that "if he could not afford an attorney, that the Court would provide an attorney for him."

Such testimony by Capasso stands uncontradicted in the record.

Capasso then transported the defendant to the offices of the Special Agents of the United States Secret Service at 90 Church Street, New York City. On arrival at such offices, defendant was fingerprinted and a photograph of him was taken.

Capasso then took defendant to the prisoner's search room. He testified, "That is the room we normally take people in after we have arrested them for questioning." He told the defendant " W e have a form here, it is a standard form. If you want to talk to me about the case you may. * * * I will read you this

form and then you read it and if you want to speak, well, fine. Sign it. If not, well, don't sign it."

The form was SS Form No. 1737. It is set forth, as it read when finally completed, in Note 8 hereto.[8]

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[8]"SS Form No. 1737
(Revised 10-17-67)

"WARNING AND CONSENT TO SPEAK

"You must understand your rights before we ask you any questions.

"You have the right to remain silent.

"Anything you say can be used against you in court, or other proceedings.

"You have the right to talk to a lawyer for advice before we question you and to have him with you during questioning.

"If you cannot afford a lawyer and want one, a lawyer will be appointed for you. If you decide to answer questions now without a lawyer present, you will still have the right to stop the questioning at any time. You also have the right to stop the questioning at any time until you talk to a lawyer.

"WAIVER OF RIGHTS

"I have read this statement of my rights and it has been read to me, and I understand what my rights are. I hereby voluntarily and intentionally waive my rights and I am willing to make a statement and answer questions. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

"/s/ John E. Panzavecchia
Signature

"1-20-70 8:50 AM
Date and Time

"CERTIFICATION

"I HEREBY CERTIFY that the foregoing Warning and Waiver of Rights were read by me to the above signatory, and that he also read it and has affixed his signature hereto in my presence.

"/s/ Joseph M. Capasso
Signature — Agent

"/s/ James L. Christian
Witness

"/s/ Thomas M. Healy"
Witness

Capasso read the form to the defendant and the defendant then read it. Capasso then asked the defendant if he understood it and the defendant said he did. He then signed the Waiver of Rights in the form. Capasso signed the Certification and Agents Christian and Healy signed it as witnesses. (See Note 8, supra.)

The completed form was marked as Government Exhibit 5 and admitted into evidence over the objection of counsel for the defendant, on the ground that it was not a voluntary waiver.

Capasso testified that after the defendant signed the waiver he had a conversation with him; that he asked the defendant "what were the problems he had in Miami"; that the defendant replied that he was accused of passing three counterfeit notes; that he asked the defendant if he knew they were counterfeit notes; that the defendant replied he was "riding around in a car with a person" who owed him some money for some merchandise, and this person gave him 18 ten dollar Federal Reserve Notes; that as they were driving around he told such person to stop, that he wanted to buy a package of cigarettes, and that he purchased a package of cigarettes, using one of the ten dollar notes to pay for it; that when he returned to the car such person (we use the term "such person" because the defendant refused to name or identify him) said, "See how easy it is to pass one of these notes." The defendant stated he did not at that time know the notes were counterfeit, but that when they stopped the next time such person told him the notes were counterfeit, and that because he owed such person a favor he a-

greed to assist him in passing them; that the defendant further stated that he went into another store, which he believed was a Whalen's Drug Store, and passed another of the counterfeit notes; and that he then knew the notes were counterfeit; that thereafter he went into another Whalen's Drug Store, where he attempted to pass another counterfeit note; that the clerk became suspicious and he fled the store, leaving the note there; that he gave the remaining notes to the person with whom he was riding around and from whom he had received them. As stated above, the defendant refused to name, describe, or to otherwise identify such person.

Counsel for the defendant moved to strike all of the testimony relative to the defendant's statement, on the ground that the statement was not voluntarily made. The motion was denied.

The defendant was fully warned with respect to all of his rights, both verbally when he was first arrested and shortly thereafter when he was taken to the search room at the Special Agents' offices, and before he signed the waiver, he was fully warned again as to all of his rights by the written statement, which was read to him and which he read and said he understood. He was told by Capasso if he wanted to talk to him to sign the waiver, and if he did not want to talk not to sign it.

There was no "lengthy interrogation or incommunicado incarceration" before the oral statement was made by the defendant, and he made no written statement.

Capasso testified that he did not at any time coerce, induce, or entice the defendant, or make any promise or threats to him to get him to make such statement. The defendant did not deny the evidence of Capasso nor testify that the statement he gave was not voluntarily made. We think the instant case is clearly distinguishable from *Miranda v. Arizona,* 384 U.S. 436.

It is true that Capasso and the defendant stopped for each of them to have a cup of coffee. The record does not show when they stopped for coffee, but from the parts of the record that we have, we think it may reasonably be inferred that it was while they were on their way from the defendant's home to the Secret Service Agents' office. Capasso jokingly said to defendant, "Well, why don't you give me a statement, so I can go down to Miami. I could use a vacation." The defendant did not testify that he took Capasso's remark seriously or that it in anywise caused him to make the statement. As a matter of fact, it does not seem to us that a remark of that kind could induce an unwilling defendant to waive his rights.

We conclude the evidence fully justified the conclusion of the trial court that the statement was made voluntarily by the defendant, after he had been fully apprised of his rights.

Accordingly, the judgment is affirmed.

JUDGMENT BELOW IN CASE No. 30044

(TITLE OMITTED)

Appeal from the United States District Court for the Southern District of Florida

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Before BROWN, Chief Judge, and PHILLIPS,* and INGRAHAM, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern DISTRICT of FLORIDA, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 28, 1971

Issued as Mandate: July 13, 1971

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*Of the Tenth Circuit, sitting by designation.

APPENDIX B

ORDER ON PETITION FOR RE-HEARING

TITLE OMITTED

Appeal from the United States District Court for the Southern District of Florida

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July 2, 1971

ON PETITION FOR RE-HEARING

Before BROWN, Chief Judge, and [illegible] and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Of the Tenth Circuit, sitting by designation.

APPENDIX C

OPINION BELOW IN CASE NO. 27322

(TITLE OMITTED)

Appeal from the United States District Court for the Southern District of Florida

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(January 13, 1970)

Before BROWN, Chief Judge, and JONES and CARSWELL, Circuit Judges.

CARSWELL, Circuit Judge: As a mathematical axiom Euclid postulated some time ago that quantities equal to the same quantity are equal to each other. Here three counts of an indictment contain verbatim language and their fusion into one and the same thing renders them inseverable as identifiable entries of separate and distinct criminal charges.

As in the case of *Van Liew v. United States*, 321 F. 2d 664 (1963), we are thus presented with a situation in which the appellant has been tried under a faulty indictment and our decision on this question precludes the necessity of considering other issues raised by appellant which are not likely to arise in the event of re-indictment or retrial.

The appellant, Panzavecchia, was indicted in three counts charging violations of 18 U.S.C. §472.[1] The three counts of the indictment were identically worded, the only distinguishing characteristic being the consecutive numbers of the counts. The counts read:

> "That on or about January 12, 1968, at Hollywood, in Broward County, in the Southern District of Florida, the defendant, John Emmanuel Panzavecchia with intent to defra did pass and utter a certain counterfeit Federal Reserve Note (Series 1950 E) on the Federal Reserve Bank of San Fran California, bearing Serial No. L 42853082 and which the defendant knew to be counterfeit, in violation of Title 18, United States Code, Section 472.

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[1] **Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645, 62 Stat. 705.**

Appellant was subsequently arraigned and pled not guilty to each count of the indictment. Appellant thereafter filed a Motion to Quash the Indictment, a Motion to Produce and a Motion for Bill of Particulars. The Motion to Produce was granted and the motion for Bill of Particulars was granted in part and denied in part. The Motion to Quash was denied after submission of written memoranda directed to the sufficiency of the indictment to charge three separate offenses.

The case was tried to a jury. The Government presented evidence of three separate utterings occurring at different places and different times of the same day. The jury returned verdicts of guilty as to Counts One and Two and not guilty as to Count Three of the indictment. The District Court entered a judgment of acquittal as to Count Three and subsequently denied defense motions for judgment of acquittal, new trial and arrest of judgment as to Counts One and Two.

In regard to the sufficiency of indictments the rule is well settled that an indictment must set forth the offense with sufficient clarity and certainty to apprise the accused of the crime with which he is charged. *United States v. Mills*, 32 U.S. 138 (1833); *Russell v. United States*, 369 U.S. 749 (1962); *Van Liew v. United States, supra* at 668. The applicable criteria have been emphasized in *Russell v. United States, supra* at 763:

> "In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an in-

> dictment is to be measured. These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet"' and, secondly, "in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Cochran and Sayre v. United States*, 157 U. S. 286, 290; *Rosen v. United States*, 161 U. S. 29, 34.' *Hagner v. United States*, 285 U. S. 427, 431. See *Potter v. United States*, 155 U.S. 438, 455; *Bartell v. United States*, 227 U. S. 427, 431; *Berger v. United States*, 295 U. S. 78, 82; *United States v. Debrow*, 346 U. S. 374, 377-378."

In the present case the indictment as drawn contravenes the second of these criteria.

The Government here laments that the only possible way to avoid the present situation is to resort to the Grand Jury minutes to determine whether the evidence presented to the Grand Jury is the same evidence presented at trial. This argument evidences a misconception of the appellant's attack upon the indictment and the basis of our decision. The Government also argues that the granting of a Bill of Particulars cured any questions appellant might have. As stated in *Van Liew v. United States, supra* at 670, the Government has confused the defendant's constitutional right to know what *offense* is charged with his need to know the *evidentiary details* establishing the facts of such of-

fense. As to the latter, the remedy lies in the Motion of Bill of Particulars, F.R.Crim.P. 7(f).

Unlike *Van Liew v. United States, supra,* we are not concerned with the *precise nature* of the violations alleged in each count under a statute charging a variety of unknown actions. Nor are we concerned with a situation involving a multiplicitous indictment wherein each of the counts in effect refers to only one offense, as was the situation in *Calvaresi v. United States,* 216 F. 2d 891, 904 (10th Cir. 1954). We are simply confronted with the question of which count relates to which offense.

In the present indictment, any of the three counts standing by itself, if applied to any of the three singular instances of uttering sought to be proved by the Government, would be legally sufficient to charge a single violation of 18 U.S.C. §472. It is only when a defendant stands charged with *two or more identical counts* that it becomes critical that each offense under 18 U.S.C. §472 be distinguished, for the protection of the defendant, by avoiding any possible confusion as to the intentions of the Grand Jury.

While a Bill of Particulars can solve evidentiary problems it cannot unlock the Grand Jury's mind and cure a defective indictment. See *Van Liew v. United States, supra* at 671-672. The present indictment fails to reveal which counts the Grand Jury intended to apply to which offenses. Consequently any future pleas of former acquittal or conviction are imperiled.

The technicality of our decision in this matter is obviously pointed up by the fact that a judgment of conviction or acquittal on *all* counts would have obviated the present dilemma.

The judgments of conviction on Counts One and Two of the indictment are reversed and the case remanded with instructions to dismiss the indictment. Nothing which we have said in this opinion will, however, preclude the issuance of a new indictment in proper form. 18 U.S.C. §3289.

REVERSED and REMANDED.

APPENDIX D

JUDGMENT OF ACQUITTAL and JUDGMENT of CONVICTION and SENTENCE in CASE No. 68-92

(TITLE OMITTED)

JUDGMENT OF ACQUITTAL (as to Count Three)
(Omitting formal parts)

JUDGMENT OF ACQUITTAL

The above - entitled cause having come on for trial and the Jury having returned a Verdict of Not Guilty.

Judgment of Acquittal is entered herein as to the Defendant,

JOHN EMANUEL PANZAVECCHIA

on Count Three

It being further

ORDERED AND ADJUDGED that the Defendant be discharged to go hence without day for return and exonerated of bond, if any, as to the Count hereinabove specified only, otherwise to remain in full force and effect.

DONE AND ORDERED at Miami, Florida this 17th day of October, A. D., 1968

/S/ C. CLYDE ATKINS
UNITED STATES DISTRICT JUDGE

App. D-2

JUDGMENT OF CONVICTION AND SENTENCE
(as to Counts one and two)
(Omitting formal parts)

On this 20th day of December, 1968 came the attorney for the government and the defendant appeared in person and by counsel, Leonard Moriber, Esq.

It is ADJUDGED that the defendant upon his plea of Not Guilty and a Verdict of Guilty by the Jury has been convicted of the offense of did pass and utter certain counterfeit notes, which the Defendant then knew to be counterfeit in violation of Title 18, United States Code, Section 472.

as charged in counts 1 and 2 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficent cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant is guilty as charged and convicted.

It is ADJUDGED that the defendant is hereby committed to the custody of the ATTORNEY GENERAL or his authorized representative for imprisonment for a period of THREE (3) YEARS on count one and THREE (3) YEARS on count two, or until otherwise discharged by due process of law.

It is further ORDERED that sentence of confinement on count two is to run concurrently with sentence of confinement imposed on count one.

It being further ORDERED that execution of sentence of confinement herein above be and the same is hereby deferred until December 26, 1968, at 9 A.M. at which time the Defendant shall surrender himself to the U. S. Marshal at Miami, Florida.

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

/S/ C. CLYDE ATKINS
C. CLYDE ATKINS
UNITED STATES DISTRICT JUDGE

APPENDIX E

INDICTMENT IN CASE No. 68 - 92

(Title Omitted)

The Grand Jury Charges:

COUNT ONE

That on or about January 12, 1968, at Hollywood, in Broward County, in the Southern District of Florida, the defendant,

JOHN EMANUEL PANZAVECCHIA

with intent to defraud, did pass and utter a certain counterfeit obligation of the United States, to wit: One counterfeit $10.00 Federal Reserve Note (Series 1950 E) drawn on the Federal Reserve bank of San Francisco, California, bearing Serial No. L 42853082 D, and which the defendant then knew to be counterfeit, in violation of Title 18, United States Code, Section 472.

COUNT TWO

That on or about January 12, 1968, at Hollywood, in Broward County in the Southern District of Florida, the defendant,

JOHN EMANUEL PANZAVECCHIA

with inrent to defraud, did pass and utter a certain counterfeit obligation of the United States, to wit: One counterfeit

$10.00 Federal Reserve Note (Series 1950 E) drawn on the Federal Reserve bank of San Francisco, California, bearing Serial No. L 42853082 D, and which the defendant then knew to be counterfiet, in violation of Title 18, United States Code, Section 472.

COUNT THREE

That on or about January 12, 968, at Hollywood, in Broward County, in the Southern District of Florida, the defendant,

JOHN EMANUEL PANZAVECCHIA

with intent to defraud, did pass and utter a certain counterfeit obligation of the United States, to wit: One counterfeit $10.00 Federal Reserve Note (Series 1950 E) drawn on the Federal Reserve oank of San Francisco, California, bearing Serial No. L 42853082 D, and which the defendant then knew to be counterfeit, in violation of Title 18, United States Code, Section 472.

A TRUE BILL

FOREMAN

WILLIAM A. MEADOWS, JR.
UNITED STATES ATTORNEY

APPENDIX F

INDICTMENT IN CASE NO. 70 - 23

(Title Omitted)

The Grand Jury Charges:

COUNT ONE

That on or about January 12, 1968, at Shatkin Drugs, in Hollywood, Broward County, in the Southern District of Florida

JOHN EMANUEL PANZAVECCHIA

with intent to defraud, did pass and utter a certain counterfeit obligation of the United States, to wit: One counterfeit $10.00 Federal Reserve Note (Series 1950 E) drawn on the Federal Reserve Bank of San Francisco, California, bearing Serial No. L 42853082 D, and which the defendant then knew to be counterfeit, in violation of Title 18, United States Code, Section 472.

COUNT TWO

That on or about January 12, 1968, at Iris Drugs, in Hollywood, Broward County, in the Southern District of Florida

JOHN EMANUEL PANZAVECCHIA

with intent to defraud, did pass and utter a certain counter-

feit obligation of the United States, to wit: One counterfeit $10.00 Federal Reserve Note (Series 1950 E) drawn on the Federal Reserve Bank of San Francisco, California, bearing Serial No. L 42853082 D, and which the defendant then knew to be counterfeit, in violation of Title 18, United States Code, Section 472.

A TRUE BILL.

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FOREMAN

ROBERT W. RUST
UNITED STATES ATTORNEY

By
William A. Daniels, Jr.
Assitant U.S. Attorney